IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35229

ROBERT J. McCORMACK,	)	**2009 Unpublished Opinion No. 485**
	)	
Petitioner-Appellant,	)	**Filed: June 2, 2009**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
STATE OF IDAHO,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Respondent.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Second Judicial District, State of Idaho, Nez Perce County. Hon. Jeff M. Brudie, District Judge.

Order dismissing petition for post-conviction relief, affirmed.

Molly J. Huskey, State Appellate Public Defender; Elizabeth A. Allred, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Daniel W. Bower, Deputy Attorney General, Boise, for respondent.

LANSING, Chief Judge

Robert J. McCormack appeals from the district court's order summarily dismissing his petition for post-conviction relief. For the reasons set forth below, we affirm the district court's decision.

I.
BACKGROUND

McCormack was convicted, on a guilty plea, of two counts of delivery of a controlled substance, Idaho Code § 37-2732(a)(1)(A). McCormack appealed, and this Court affirmed his conviction and sentence.

On November 7, 2007, McCormack filed a pro se petition for post-conviction relief. Paragraph 7 of the petition expressed his claims as follows:

> (a) Ineffective Assistance of Counsel - Failed to discover or raise issues at the appropriate time.

(b) Change of Venue - Judge Jeff Brudie was a public defender to Petitioner on other charges a few years back.
(c) The police or prosecutor withheld favorable information from defense.
([d]) A conflict of interest.

In paragraph 9 he detailed the bases for his ineffective assistance of counsel claim as follows:

(a) Suppress evidence on confidential informant. Illegal search and seizure.
(b) To change venue on Judge Jeff Brudie. Judge should of withdrawn from case.
(c) Ineffective for failing to discover or raise issues at appropriate time.

The district court appointed counsel to represent McCormack. The State filed a motion for summary dismissal and a supporting brief. More than three months later, the district court granted the State's motion, summarily dismissing McCormack's post-conviction claims.

McCormack appeals the dismissal of only his "change of venue" and "conflict of interest" claims pleaded in paragraphs 7(b) and (d). He asserts that as to the venue claim, the State's motion for summary dismissal gave him no notice or inadequate notice of the claimed grounds for dismissal and that the district court dismissed on a basis different from that expressed in the State's motion. As to the conflict of interest claim, he argues that the State's motion gave insufficient notice of the ground for dismissal.

II.
ANALYSIS

A. Notice Standard

A petition for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Summary dismissal of a petition pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible when the petitioner's evidence has raised no genuine issue of material fact that, if resolved in the petitioner's favor, would entitle the applicant to the requested relief. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987).

Idaho Code § 19-4906 authorizes summary dismissal of a petition for post-conviction relief either upon motion of a party or upon the court's own initiative. However, a trial court

may not dismiss a petition *sua sponte* without first giving notice of its intent and its reasons for doing so, and allowing the applicant twenty days in which to respond. I.C. § 19-4906(b); *Saykhamchone v. State*, 127 Idaho 319, 321, 900 P.2d 795, 797 (1995); *State v. Christensen*, 102 Idaho 487, 488-89, 632 P.2d 676, 677-78 (1981). Likewise, if the State moves for summary dismissal, the motion must state grounds with particularity, and the applicant must be given twenty days to make a response. *Saykhamchone*, 127 Idaho at 322, 900 P.2d at 798; *Christensen*, 102 Idaho at 488-89, 632 P.2d at 677-78. The notice procedure required by I.C. § 19-4906 is necessary to afford the applicant an opportunity to respond and to establish a material issue of fact if one exists. *Flores v. State*, 128 Idaho 476, 478, 915 P.2d 38, 40 (Ct. App. 1996). As we explained in *Martinez v. State*, 126 Idaho 813, 892 P.2d 488 (Ct. App. 1995):

> Motions for summary disposition pursuant to I.C. § 19-4906 are procedurally equivalent to motions for summary judgment under I.R.C.P. 56(e), and they are therefore subject to similar notice standards. It is clear that in summary judgment proceedings the nonmovant is required to respond only to alleged grounds for summary judgment asserted by the moving party. The nonmovant need not address any aspect of the nonmovant's case that has not been challenged by the opposing party's motion.

Id. at 817-18, 892 P.2d at 492-93 (citations omitted). If the State files a motion for summary dismissal but the court decides to dismiss the application on grounds different from those asserted in the State's motion, the court may do so but only after giving twenty days' notice of its intent as required by I.C. § 19-4906(b). *Saykhamchone*, 127 Idaho at 321-22, 900 P.2d at 797-98.

The Idaho Supreme Court recently addressed the notice that must be afforded in an I.C. § 19-4906(c) motion in *DeRushé v. State*, 146 Idaho 599, 200 P.3d 1148 (2009). The Court there said that the Idaho Rules of Civil Procedure require only "reasonable particularity" in stating the grounds for a motion, and this notice requirement is met if "the notice is sufficient that the other party cannot assert surprise or prejudice." *Id.* at 601, 200 P.3d at 1150. The Court ultimately held that an applicant for post-conviction relief cannot challenge on appeal the sufficiency of the grounds stated in the State's motion for summary disposition unless the applicant first challenged the sufficiency of the notice in the trial court. *Id.* at 602, 200 P.3d at 1151. *DeRushé* does not, however, preclude an applicant from asserting for the first time on appeal that the district court improperly summarily dismissed a claim without providing any notice either through the State's motion or the court's own notice. In addition, *DeRushé* does not hold that if the State files a

motion for summary dismissal but the district court dismisses on a ground not contained in the State's motion without providing additional notice, an applicant is precluded from challenging that error for the first time on appeal.

McCormack argues that the State's motion provided no notice or insufficient notice of grounds for dismissal of his claim 7(b) for "change of venue" and insufficient notice of the grounds for dismissal of claim 7(d) for "conflict of interest." He also contends that the district court dismissed the change of venue claim on grounds different from the grounds expressed in the State's motion without first giving McCormack notice of the court's basis for dismissal.

We begin by rejecting McCormack's contention that the State gave no notice of its claimed basis for dismissal of the change of venue claim. In the State's brief supporting its motion for summary dismissal the State reasonably inferred that the bare "conflict of interest" claim stated in paragraph 7(d) of the petition referred to the allegations in paragraph 7(b) that the venue for his criminal trial should have been changed because the presiding district judge had been a public defender who represented McCormack on other charges in prior years, and that the same venue/conflict of interest allegation underlay the claim of ineffective assistance in paragraph 9(b) of the petition, where McCormack complained that his attorney was deficient for failing to "change venue on Judge Jeff Brudie." In urging the dismissal of McCormack's petition, the State's brief stated:

> McCormack next claims that his trial counsel was ineffective by failing to request a change of venue. McCormack states that the trial judge previously represented him on other charges prior to becoming a judge, thus creating a conflict of interest. However, McCormack does not specify how this created a conflict of interest. He also does not state that this prior representation created any actual prejudice to his case. Finally, a change of venue would not have solved this perceived conflict of interest since the trial judge remains the same even if a change of venue is granted.

The State's brief also asserted generally that McCormack's petition "contains conclusory allegations lacking supporting evidence." These statements in the State's brief are adequate to give notice of grounds for dismissal of McCormack's 7(b) change of venue claim. Although the State's argument was couched in terms of addressing his claim of ineffective assistance of counsel for failure to request a change of venue, the State's rationale also inherently stated a basis for rejection of McCormack's separate change of venue claim stated in paragraph 7(b).

McCormack also contends that the bases expressed by the district court for dismissal of the 7(b) change of venue claim are different from those raised by the State in its motion, and

therefore he was given no notice of the grounds relied upon by the court and no opportunity to respond. The grounds articulated in the State's brief are quoted above. In granting the State's motion, the district court gave the following explanation for dismissal of the claims related to the judge's alleged conflict of interest and the corresponding need for a change of venue:

> (2) Change of Venue
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> Though denominated as Change of Venue, it is apparent from McCormack's affidavit and Declaration that he is actually raising an issue of automatic disqualification by the Court, on the basis that the presiding judge represented McCormack on certain criminal charges in the early 1990's. McCormack cites I.C.R. 25 for the proposition that the Court, having at some time represented him, is disqualified from presiding over any subsequent action filed thereafter against him. The issue has been addressed by the Idaho Supreme Court in *State v. Zamora*, 129 Idaho 817, 933 P.2d 106 (1997). As held in *Zamora*, a judge is only disqualified from presiding over the same case in which he previously represented a party, not a subsequent unrelated one. Since McCormack's issue has no basis in law, summary disposition on this issue is appropriate.
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> . . . .
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> (4) Conflict of Interest
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> McCormack again fails to identify any conflict of interest and fails to support his allegation with specific facts. Therefore, summary disposition is appropriate.

It can be legitimately debated whether the basis stated by the district court for the dismissal of this claim was different from that stated in the State's brief, or whether the court simply presented a different articulation of the State's point that there was no basis for a "change of venue" (by which McCormack clearly meant a change of judge) because the trial judge could not have been disqualified from presiding in McCormack's criminal case in the absence of an actual conflict of interest caused by the judge's prior representation of McCormack. We do not resolve this question, however, because even assuming that the court erred by dismissing this claim for reasons different than those specified in the State's motion, we may still affirm the dismissal if the State's motion presented valid grounds calling for dismissal of the claim. If a trial court reaches the correct result by an erroneous theory, on appellate review the order will be affirmed under the correct theory. *McKinney v. State*, 133 Idaho 695, 700, 992 P.2d 144, 149 (1999).

Here, the State correctly argued that McCormack failed to allege any facts showing an actual conflict of interest, such as judicial bias or prejudice, stemming from the previous representation. McCormack's initial petition offered no evidence of bias or prejudice, and his

responses to the State's motion did not correct this deficiency. The State also correctly pointed out that a "change of venue" would not have resulted in a different presiding judge, I.C.R. 21(c). Thus, even if the district court's reasons for granting summary dismissal were incorrect, the State's grounds were correct and provided McCormack adequate notice and opportunity to respond. McCormack's response to the State's motion did not include any new evidence or legal argument showing how the judge's representation of McCormack several years earlier in a different case would create a conflict or bias that could have prejudiced McCormack in the criminal action. He therefore showed no basis for disqualifying the judge or "changing venue."

Lastly, we consider McCormack's assertion that the State's motion did not sufficiently articulate the basis for dismissal of the 7(d) conflict of interest claim, thereby depriving him of a meaningful opportunity to respond. This issue is raised for the first time on appeal. McCormack did not object to the sufficiency or particularity of the State's motion before the district court or contend that he did not understand the State's argument. Although McCormack filed a brief (which was untimely) opposing the State's motion for summary disposition, it neither addressed the State's arguments regarding this claim nor objected that the State's grounds were not stated with sufficient particularity to provide adequate notice to him. McCormack therefore has waived any objection to the sufficiency of the notice, and *DeRushé* dictates that he may not present this issue for the first time on appeal.

McCormack having shown no reversible error, the district court's order summarily dismissing McCormack's petition for post-conviction relief is affirmed.

Judge GUTIERREZ and Judge GRATTON **CONCUR.**